tiff recognized the ordinary risks of the game and that by electing to sit in the unscreened section she assumed these risks. But in the *Eno* case[11] the plaintiff was held not to assume the risk of being hit when practice was being held between games by several groups of plays at the same time, some of them being in close proximity to the stands, because she couldn't watch all the balls at once.

A distinction has recently been drawn between baseball and hockey. The latter game is not so well understood. The puck is supposed to be played on the ice and the danger of it being driven through the air is not so apparent, at least to the average spectator. It has been held that a patron may rely upon the duty of the management to furnish seats that are reasonably safe for the intended use and that a spectator, at least in the absence of actual knowledge of the dangers of the game, does not assume the risk of being hit by the puck.[12] On the other hand, the greater general understanding of the national game, the greater area that would have to be fenced if everything around the playing field was to be protected, and the recognized preference of the majority of "fans" for the unscreened sections all combine to support the view that the defendant's duty is satisfied if it furnishes a protected place to which those who wish security from the risks of the game may resort.

R. L. B.

Negligence — Duty of Landlord to Persons on and off the Premises

The plaintiff was struck and injured by falling glass, while walking on the sidewalk of a busy thoroughfare. A worn sash cord, supporting the upper sash of a sixth floor window in the building she was passing, had, by reason of wear, given way. The sash dropped to the sill, shattering its pane of glass and causing fragments thereof to fall to the sidewalk, where one of them struck the plaintiff on the head. When the accident occurred and for some two years prior thereto, the building was owned by the defendant and occupied by a tenant under a printed form lease in which was inserted in typewriting the following covenants: "The lessor shall keep the outside of said building in good repair, and the lessee shall make all inside repairs, and for that purpose all window glass shall be considered as inside." In reversing the Court of Appeals for Hamilton County, the Supreme Court of Ohio upheld the plaintiff's right to recover from the defendant owner for negligence in failing to keep the premises in repair, in accordance with his covenant.[1]

[11] Note 9, *supra*.

[12] *Shanney* v. *Boston Madison Square Garden Corp.* — Mass. —, 5 N.E. (2d) 1 (1936); *James* v. *Rhode Island Auditorium, Inc.*, — R.I. —, 199 Atl. 293 (1938).

[1] *Friedl* v. *Lackman*, 136 Ohio St. 110, 23 N.E. (2d) 950 (1939).

The significance of the foregoing decision becomes more apparent when it is compared with decisions in other cases having similar fact situations. For that reason it is believed that an examination of these related cases is appropriate.

Liability of Landlord to Tenant

The general rule, subject to exceptions, is that where a landlord puts a tenant in full control of the premises, he is not liable to the tenant, or one entering the premises in the right of the tenant, for personal injuries sustained by reason of the disrepair of such premises.[2] There is an immediate exception to the rule where the cause of the injury is a latent or concealed defect of which the landlord had notice and which the tenant could not discover by ordinary inspection.[3] The rule has been qualified further by the development of an exception where the premises are leased for a public or quasi-public purpose. In such circumstances, the lessor has an affirmative duty to see that the premises are free from dangers which would render them unsafe for the intended use.[4]

A fundamental assumption in the general rule, considered above, is the release of possession and control by the landlord to the tenant. For that reason it is not strange to find that where the landlord retains control of a part of the premises for his own use, or for the use of other tenants, as in the case of a common stairway or passageway, he is under a duty to use reasonable care in keeping such places in a safe condition.[5] From this it would seem not unreasonable to infer that where the landlord covenants to repair the premises he might remain liable by reason of the measure of control thus retained. This conclusion is not borne out by the majority of cases, although, as will be seen, the trend appears to be in that direction.

The majority of courts have remained steadfast in their refusal to allow an action for injuries to the tenant, or his invitee, caused by the landlord's failure to perform his covenant.[6] In support of their position,

[2] 36 C.J. 204; 2 Torts Restatement sec. 355.

[3] *Shinkle* v. *Birney*, 68 Ohio St. 328, 67 N.E. 715 (1903); *Cowen* v. *Sunderland*, 145 Mass. 363, 14 N.E. 117, 1 Am. St. 469 (1888); *Miner* v. *McNamara*, 81 Conn. 690, 72 Atl. 138 (1909); *Steefel* v. *Rothchild*, 179 N.Y. 273, 72 N.E. 112 (1904); *Godard* v. *Peavy*, 32 Ga. App. 121, 122 S.E. 634 (1924); 2 Torts Restatement sec. 358.

[4] *Barrett* v. *Lake Ontario Beach Improvement Co.*, 174 N.Y. 310, 66 N.E. 968 (1903); *Folkman* v. *Lauer*, 244 Pa. 605, 91 Atl. 218 (1914); *Turner* v. *Kent*, 134 Kan. 574, 7 P. (2d) 513 (1932); *Gilligan* v. *Blakesley*, 93 Colo. 370, 26 P. (2d) 808 (1933); 2 Torts Restatement sec. 359. And see Eldridge, *Landlord's Tort Liability for Disrepair*, (1936) 84 Univ. Pa. L. Rev. 467, 477.

[5] *Davies* v. *Kelley*, 112 Ohio St. 122, 146 N.E. 888 (1925); HARPER, TORTS sec. 103 (1933); 2 Torts Restatement sec. 361. The cases are collected in 97 A.L.R. 220 (1935).

[6] *Berkowitz* v. *Winston*, 128 Ohio St. 611, 193 N.E. 343 (1934); *Cullings* v. *Goetz*, 256 N.Y. 287, 176 N.E. 397 (1931); *Anderson* v. *Robinson*, 182 Ala. 615, 62 So. 512 (1913); *Grazer* v. *Flanagan*, 35 Cal. App. 724, 170 Pac. 1076 (1917). The cases are collected in 8 A.L.R. 765 (1920) and 68 A.L.R. 1194 (1930).

these courts have offered various logical reasons. In actions on the contract they say that the damages are too remote to have been within the contemplation of the parties and are not the proximate result of the breach.[7] In actions in tort the theory seems to be that there is no legal duty owing from the lessor to the tenant or persons in privity with him except by virtue of the contract, and that a mere breach of contract will not support an action in tort.[8] But in recent years there has been a growing tendency to hold the landlord responsible in tort where his failure to meet this self imposed obligation has resulted in injury.[9] Characteristic of the attitude of courts adopting this view is the expression found in one of the early cases: "But where the landlord agrees to repair and keep in repair the leased premises, his right to enter and have possession of the premises for that purpose is necessarily implied, and his duties and liabilities are in some respects similar to those of an owner and occupant and if his negligence in making or failing to make the repairs results in an unsafe condition of the premises, he is liable for injuries caused thereby to persons lawfully upon the premises who are not guilty of contributory negligence on their part.[10] The rationale of the minority view is further elucidated in the following passage: "although an award of contract damages may be sufficient to insure the performance of the ordinary covenant, the interest of the public in the physical well-being of its members presents a justifiable reason for imposing liability upon the landlord . . . when a breach of his covenant to repair creates a danger of serious injury to the tenant's person or property.[11]

It is submitted that the equitable results obtainable under the minority view fully justify a departure from the more orthodox, yet time worn, precedents followed by the majority of courts thus far. Even in a jurisdiction where the strict rule is firmly imbedded by a succession of cases one finds, more recently, a sympathetic attitude towards the approach espoused by the minority.[12] Indicative of the modern trend of authority is the adoption by the American Law Institute of the minority view.[13] It is believed that the sanction thus given by the Institute will serve to

[7] *Williams* v. *Fenster*, 103 N.J.L. 566, 137 Atl. 406 (1927); *Murrell* v. *Crawford*, 102 Kan. 118, 169 Pac. 561 (1918); *Jordan* v. *Miller*, 179 N.C. 73, 101 S.E. 550 (1919).

[8] *Berkowitz* v. *Winston*, 128 Ohio St. 611, 193 N.E. 343 (1934); *Norris* v. *Walker*, 110 S.W. (2d) 404 (Mo. App. 1937); *Dustin* v. *Curtis*, 74 N.H. 266, 67 Atl. 220 (1907); *Tuttle* v. *Gilbert Mfg. Co.*, 145 Mass. 169, 13 N.E. 465 (1887).

[9] *Flood* v. *Pabst Brewing Co.*, 158 Wis. 626, 149 N.W. 489 (1914); *Merchants Cotton Press and Storage Co.* v. *Miller*, 135 Tenn. 187, 186 S.W. 87 (1916); *Ross* v. *Haner*, 244 S.W. 231 (Tex. Civ. App. 1922); *Pinkerton* v. *Slocumb*, 126 Md. 665, 95 Atl. 965 (1915); *Dean* v. *Hershowitz*, 119 Conn. 398, 177 Atl. 262 (1935).

[10] *Barron* v. *Liedloff*, 95 Minn. 474, 475, 104 N.W. 289 (1905).

[11] Harkrider, *Tort Liability of a Landlord* (1928) 26 Mich. L. Rev. 383, 399.

[12] *Cullings* v. *Goetz*, 256 N.Y. 287, 176 N.E. 397 (1931).

[13] 2 Torts Restatement sec. 357.

mark the way for those jurisdictions which are as yet unhampered by judicial precedents, and that future years will see a gradual shift to the now minority rule which is more consonant with present day social and economic conditions.

Liability of Landlord to Outsiders

Where the landlord surrenders control of his property to the tenant, in the absence of an agreement to the contrary, the tenant is obliged to keep the premises in repair and is responsible for injuries to outsiders, resulting from the condition or use thereof.[14] If, on the other hand, the property is transferred in such a state of disrepair as to be a nuisance, or when they must necessarily become so, the lessor remains liable to outsiders.[15] Moreover, the landlord will be held liable even though the nuisance was created entirely by the tenant, provided it arose as a consequence of the use contemplated by the parties.[16]

What has been said with respect to the landlord's liability to tenants and persons on the premises when he has retained control of a portion thereof, appears to be equally true as to persons outside the premises, whether they be occupants of the adjoining land or merely pedestrians.[17] Thus, where the landlord leases a building to several tenants and retains control of the roof, he will be held liable to a pedestrian injured by reason of ice forming on the sidewalk from water discharged thereon because of negligence in failing to repair drain pipes.[18]

If the landlord covenants to repair the premises, the courts appear to be uniform in holding him liable to persons outside the premises, for injuries caused by his failure to make the agreed repairs.[19] And it has been held recently that the same result will be reached where the land-

[14] 16 R.C.L. 1063.

[15] *Shindlebeck* v. *Moon*, 32 Ohio St. 264, 30 Am. Rep. 584 (1877); *Dennis* v. *Orange*, 110 Cal. App. 16, 293 Pac. 865 (1930); *Calway* v. *William Schaal and Son*, 113 Conn. 214, 155 Atl. 813 (1931); *Haas* v. *Booth*, 182 Mich. 173, 148 N.W. 337 (1914). The use of the nuisance theory in cases involving persons on the premises has been criticized. 37 Mich. L. Rev. 1332 (1939).

[16] *Haggert* v. *Stehlin*, 137 Ind. 43, 35 N.E. 997 (1893); *Maloney* v. *Hayes*, 206 Mass. 1, 91 N.E. 911 (1910); *Louisville and N. Terminal Co.* v. *Jacobs*, 109 Tenn. 727, 72 S.W. 954 (1902). And see: *Langabaugh* v. *Anderson*, 68 Ohio St. 131, 67 N.E. 286 (1903).

[17] *Munger* v. *Union Savings & Loan Assn.*, 175 Wash. 455, 27 P. (2d) 709 (1933); *Young* v. *Talcott*, 114 Conn. 675, 159 Atl. 881; *Gilland* v. *Magnes*, 216 Mass. 581, 104 N.E. 555 (1914); *O'Connor* v. *Andrews*, 81 Tex. 28, 16 S.W. 628 (1871).

[18] 24 Ohio Jur. 970 (1932).

[19] *Smith* v. *Preston*, 104 Me. 156, 71 Atl. 653 (1908); *Boyce* v. *Tallerman*, 183 Ill. 115, 55 N.E. 703 (1899); *Payne* v. *Rogers*, 2 H. Bl. 350, 126 Eng. Reprint 590 (1794). And see *dicta* in the following cases: *Burdick* v. *Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767 (1875); *City of Lowell* v. *Spaulding*, 58 Mass. (4 Cush.) 277 (1849); *Fleischer* v. *Citizens Real Estate and Investment Co.*, 25 Or. 119, 35 Pac. 174 (1894).

lord simply reserves a right to enter to make repairs. [20] The rule with respect to covenants was first laid down in the English case of *Payne* v. *Rogers*,[21] where an action was allowed directly against the landowner in order to avoid circuity of action. While that case has been accepted unquestionably in a few jurisdictions in this country,[22] the theory on which it is based has been criticized severely.[23] The true theory on which the landlord is held responsible in these cases is not that he is under any contractual duty to outsiders, but that, because of his covenant, he retains control of the premises, and his duty to the public is unaffected by the lease.[24]

It appears, then, that there is a distinction between the liability of the landlord who covenants to repair, for injuries to the lessee, and the liability of a landlord under similar provisions for injuries to persons outside the property.[25] It appears further that this distinction is based upon the power of control reserved to the landlord. Where persons enter the premises at the invitation of the tenant they are required to look to him for their safekeeping, and the owner is not bound to anticipate that the tenant will use or allow others to use property which the owner has failed to repair in breach of his covenant. Therefore, the control retained by the owner is insufficient to cast upon him the duty of making the premises safe for use.[26] But as was said in *Appel* v. *Muller*,[27] "the case of a passerby on the public street is wholly different. In such a case there is no need that a duty be newly created by covenant. The duty, that of using care towards a member of the public, was established when the landlord came into ownership of the property. It might have been suspended during the exclusive occupancy of the tenant, for the power of entry to make repairs would have been lost. If, however, there is a

[20] *Appel* v. *Muller*, 262 N.Y. 278, 186 N.E. 785, 89 A.L.R. 477 (1933). But see *dictum* in *Myers* v. *Pepperell Mfg. Co.*, 122 Me. 265, 119 Atl. 625 (1923).

[21] 2 H. Bl. 350, 126 Eng. Reprint 590 (1794).

[22] *City of Lowell* v. *Spaulding*, 58 Mass. (4 Cush.) 277 (1849); *Boyce* v. *Tallerman*, 183 Ill. 115, 55 N.E. 703 (1899); *Perez* v. *Raybaud*, 76 Tex. 191, 13 S.W. 177 (1890).

[23] *Cullings* v. *Goetz*, 256 N.Y. 287, 176 N.E. 397 (1931); Harkrider, *Tort Liability of a Landlord* (1928) 26 Mich. L. Rev. 531, 540. Professor Bohlen in his "STUDIES IN THE LAW OF TORTS" (1926) at p. 209, argues: "It is very doubtful whether this is the true reason or indeed a tenable reason for holding a landlord liable because of his covenant to repair the exterior of leased premises. It implies that such a covenant binds the landlord to indemnify the tenant for any damages which he may have to pay to a stranger because of the bad repair of the premises which he occupies. It does not explain why such a covenant should have such an effect, while a covenant to repair the interior of the premises is construed to bind the landlord no further than to reimburse the tenant for the cost to which he is put in making for himself these repairs which the landlord, in breach of his covenant has failed to make."

[24] *May* v. *Ennis*, 78 App. Div. 552, 555, 79 N.Y. Supp. 896 (1903); *Burdick* v. *Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767 (1875).

[25] 89 A.L.R. 480 (1934).

[26] BOHLEN, supra, p. 210.

[27] 262 N.Y. 278, 186 N.E. 785, 89 A.L.R. 477 (1933).

covenant to repair, the landlord's duty to the public to maintain the structure in safe condition, and his retention of power to perform the duty combine to make him liable."

In the principal case it would seem that the Court of Appeals was misled by the decision in *Berkowitz* v. *Winston*.[28] That case dealt with an employee of a lessee, but the syllabus read: "Liability in tort is an incident to occupation and control; occupation and control are not reserved by an agreement to make repairs." And while the Court of Appeals recognized that this statement was limited by the facts in the case, it felt that the same rule was applicable in the case of a pedestrian. Fortunately, the Supreme Court viewed the matter in a different light, although no mention was made of the *Berkowitz* case in the opinion. It is submitted that the result reached in the principal case was entirely just and in harmony with the prevailing law in the country. It is, however, to be regretted that the court considered it unnecessary to review the status of the law on the problem. Instead, the court virtually disposes of the case with the laconic statement: *"Sic utere tuo ut alienum non laedas."* W. L. A.

Torts — Negligence — Highway Obstruction Statute Per Se Negligence — Proximate Cause

Plaintiff sustained injuries when an automobile in which he was riding as a passenger struck the defendant's freight car at a common grade crossing. Both driver and plaintiff were familiar with highway and crossing. The accident occurred at night; some witnesses said there was fog. No special precautions had been taken by the defendant to warn approaching motorists of the obstruction. Conflicting testimony indicated that the defendant's employees, engaged in a switching operation, had allowed the freight car to remain in a position blocking the highway for a period longer than the statutory five minutes. This being a violation of G.C. sec. 7472, plaintiff contended that defendant was negligent as a matter of law, and that such negligence was the proximate cause of his injuries.[1] The trial court's judgment for the plaintiff was reversed in the appellate court of the Sixth District, and final judgment entered for the defendant. Because of a conflicting deci-

[28] 128 Ohio St. 611, 193 N.E. 343 (1934).

[1] Ohio G.C. 7472: "A person or corporation . . . who obstructs, unnecessarily, a public road or highway authorized by any law of this state, by permitting a railroad car or locomotive to remain upon or across it for longer than five minutes . . . shall forfeit and pay for each offense, not less than two dollars, nor more than twenty dollars." See also General Code Section 7473 regarding liability of the railroad for damages resulting from violation of the preceding section.